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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1127

CHARLES FREDERICK ROCHA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Charles Frederick Rocha, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 12, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Court, printed in Appendix "A" hereto, infra, pp. i-viii, is reported in ..... F.2d ..... (December 12, 1967).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on December 12, 1967. (A copy thereof is printed in Appendix "B".) A timely petition for rehearing was filed on January 10, 1968 and denied by said Court on January 18, 1968. On application of petitioner, that Court stayed the issuance of its mandate under Rule 26 of that Court pending the filing, consideration and disposition of this petition by this Court providing this petition is filed on or before February 19, 1968.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sections 1254(1) and 1651(a).

QUESTIONS PRESENTED

1. When evidence is seized under color of a search warrant issued by a California state magistrate and the supporting affidavit is found to be illegal by the issuing magistrate; and, because of this, the magistrate suppresses the evidence so seized, can the federal government lawfully pursue a prosecution based on the same illegally obtained evidence, especially when there is no Court order (state or federal) to bring the evidence before the federal Court?

2. Is an affidavit supporting a search warrant issued by a state magistrate valid if based merely upon hearsay or hearsay upon hearsay?

3. If a search warrant is held to be invalid after officers have elected to obtain on and execute it, can the officers defend the search on the alternative basis that there was probable cause to arrest and search without a warrant prior to obtaining the warrant and such information was not properly transmitted to the magistrate at the time of obtaining the warrant?

4. Is the statute under which petitioner stands convicted (21 U.S.C. Section 174) unconstitutional in part in that it provides that whenever on trial for a violation of the section for fraudulently or knowingly importing a narcotic drug into the United States, and the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction *unless the defendant explains the possession to the satisfaction of the jury?*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. Section 174 (1956):

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF THE CASE

The Court of first instance herein was the United States District Court for the Northern District of California and the basis for jurisdiction therein was the charge that petitioner was indicted with concealing and facilitating the concealment of heroin in violation of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. Section 174 (1956).

Petitioner was convicted of the charge and sentenced to a term of 10 years imprisonment on May 12, 1966. On May 20, 1966, a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed. Thereafter, petitioner's judgment of conviction was affirmed (supra).

Petitioner was arrested at the Sunland Service Station, which he operated, in San Jose, California, on November 23, 1965, by Sergeant Stanley E. Shaver of the Santa Clara County Sheriff's Department for violation of California Health and Safety Code Section 11500, a felony, to wit, possession of heroin. Petitioner posted bail in the state Court, was arraigned and entered a plea of "not guilty" therein.

At the time of petitioner's arrest, Sergeant Shaver executed a search warrant which he had obetined earlier from the Honorable Edward J. Nelson, Judge of the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, California.

Thereafter, and on February 3, 1966, after timely motions to quash the affidavit in support of the search warrant and to suppress the evidence seized by the authority thereof before the said Judge Nelson, the motions were granted and Judge Nelson entered his order suppressing the evidence so seized.[1] Bail was exonerated, the Complaint was dismissed and no further proceedings were had in the California Courts.

The evidence so suppressed had been taken pursuant to the execution of the search warrant from a safe on the premises. Shortly after petitioner's arrest, the suppressed contraband was handed by Sergeant Shaver to a federal agent without a Court order of any kind and was used in petitioner's prosecution by the federal government below.

Thereafter, an indictment was filed in the United States District Court for the Northern District of California, Southern Division, and petitioner was arraigned. He entered a plea of not guilty to the charge of violation of Title 21, U.S.C. Sec. 174, to wit, unlawful sale and concealment of heroin, involving the identical contraband suppressed by Judge Nelson.

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[1]The motions were made pursuant to the provisions of California Penal Code Sections 1539 and 1540, which sections provide for a hearing to suppress evidence before the magistrate who has issued a search warrant.

A timely motion to suppress the evidence under Rule 41e, Federal Rules of Criminal Procedure, Title 18, *United States Code* was interposed by petitioner. A hearing on the motion was had on February 16, 1966, prior to trial, before the Honorable Lloyd H. Burke, Judge of the District Court. The Court denied the motion on that date. (A copy of the Reporter's Transcript of the hearing has been filed with this Court in the Clerk's certiorari record, together with exhibits which include the transcript of the hearing on the Motion to Suppress on February 3, 1966, before the aforesaid Edward S. Nelson, Judge; Judge Nelson's order suppressing the evidence seized under the execution of the State search warrant; and a copy of the affidavit for search warrant, the search warrant issued by Judge Nelson and executed by Sergeant Shaver and the return of Officer Perovich.)

Thereafter, petitioner was convicted of the federal offense as charged after trial by jury, and on May 12, 1966, was sentenced to a term of ten years imprisonment by the Honorable Albert Wollenberg, Judge of the United States District Court.

The pertinent part of the affidavit for search warrant to establish probable cause is as follows:

> "Following is the basis for affiant's beliefs stated herein:
>
> "Affiant is a deputy sheriff with the Santa Clara County Sheriff's Department investigating illicit narcotics activity in Santa Clara County.
>
> "Affiant this date arrested Frank Benjamin Ram aka Frank Benjamin Reyes, for possession

of heroin and for sale of heroin, occurring in the San Jose area in the past two weeks. On three separate occasions when the suspect Frank Benjamin Ram sold heroin to a Federal Narcotics Agent, said Frank Benjamin Ram has been observed to go to the aforesaid Sunland Service Station at the above address, and to contact the person known as Fred at that address, described as a Mexican male, approximately 40 years of age, and wearing glasses. (Fred Rocha)

"Also arrested by your affiant this date was a woman who was in the company of the aforesaid Frank Benjamin Ram, known to your affiant as Lavina Medina, known to your affiant to be on parole as a narcotics addict, and said Lavina Medina stated to your affiant that the narcotics which were in the possession of Frank Benjamin Ram were obtained by him from Fred at the aforesaid Sunland Service Station. (Fred Rocha)

"Your affiant knows that the aforesaid person known as Fred Rocha works at the aforesaid Sunland Service Station.

"Affiant desires to search at night because, to his knowledge, most narcotic activity takes place at night."

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. THE CONTRABAND NOT SUPPRESSED BY THE UNITED STATES DISTRICT COURT WAS NOT LEGALLY BEFORE THE COURT AT THE TIME OF THE MOTION TO SUPPRESS.

The contraband herein was suppressed, after a proper motion was made, by the *very* magistrate who issued the State search warrant under which the contraband was seized. After the Motion to Suppress was

granted by the state Court, the suppressed contraband was turned over to the federal authorities without a Court order of any kind. (See Government's Exhibits Nos. 3 and 4, attached to Reporter's Transcript on the certiorari record on file herein.)

California Penal Code Sec. 1528 provides:

> "If the magistrate is thereupon satisfied of the existence of the ground of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county commanding him forthwith to search the person or place named, for the property or things specified, *and to retain such property or things in his custody subject to order of the Court as provided by Sec. 1536.*" Stats. 1957, Chap 1885. (Emphasis added.)

California Penal Code Sec. 1536 provides:

> "All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the Court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable." Stats. 1957, Chap. 1885.

In that there was no order to deliver the suppressed contraband to the federal government for prosecution, the federal government obtained its possession in contravention of the laws of the State of California. By not attempting to remove the contraband from the State of California in accordance with the State or federal law and by not obtaining a Court Order, nor

obtaining a federal search warrant, the federal government should be barred from considering the contraband as evidence, and the Motion to Suppress should have been granted by the Court herein. *Elkins v. U.S.*, 364 U.S. 206.

The contraband was brought before the federal Court by federal search warrant. (364 U.S. 207, fn. 1.)

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2. REGARDLESS OF THE STATE COURT PROCEEDINGS HEREIN, THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT DOES NOT MEET FEDERAL STANDARDS.

Evidence secured as a result of the execution of the search warrant herein by State officers was illegally secured and was inadmissible in evidence. The search warrant employed was issued pursuant to an affidavit that was insufficient under the Fourth and Fourteenth amendments to the United States Constitution to show reasonable and probable cause for the search. The insufficiency of the affidavit was duly raised below by pre-trial and on-trial Motions to Suppress the evidence thus obtained.

The affidavit of Edward Perovich, in support of the issuance of the warrant, states of his own knowledge only two things:

1. "Fred Rocha works at the aforesaid Sunland Service Station," and

2. "Most narcotic activity takes place at night."

The magistrate issuing the search warrant may consider only the information brought to his attention

and the reviewing Court may consider only the information before the magistrate at the time of the issuance of the search warrant in determining whether reasonable and probable cause existed. See *Giordenello v. United States,* 357 U.S. 480.

Admission of evidence secured through use of a search warrant issued on the basis of insufficiently corroborated hearsay testimony contravenes the Fourth Amendment to the United States Constitution. Although an affidavit that sets out personal observations relating to probable cause is not insufficient merely because the observations are not those of the affiant, a substantial basis for crediting the hearsay must be presented. *Jones v. the United States,* 362 U.S. 257. In such a case, the affiant must inform the magistrate of some of the facts and circumstances relied upon by the informant in making his statements to the affiant and of facts and circumstances both for concluding that the informant is credible and for concluding that the information communicated to the affiant is reliable. See *Aguilar v. Texas,* 378 U.S. 108. The affidavit cannot be based on the mere suspicion, belief, or conclusion of either affiant or the informant. See *Nathanson v. United States,* 290 U.S. 41, *Aquilar v. Texas,* supra, and *Jones v. United States,* supra.

The information set forth in the affidavit herein fails to meet the federal standards.

The affiant states that he arrested one Frank Benjamin Ram for possession of heroin and for sale of

heroin, occurring in the San Jose area, "in the past two weeks". The affiant further alleged that the said Frank Benjamin Ram had been observed "to contact" the appellant at the Sunland Service Station on three occasions prior to Ram making sales to a federal agent. There is nothing in the affidavit to indicate where the officers executing the affidavit obtained this information. At no place is it set forth that this was a personal observation of the affiant. Not stating that the information was obtained by affiant personally, such information is purely hearsay. Not knowing from whom the information came, its reliability and credibility is nil. Some basis for concluding that such information is credible and reliable must be set forth in the affidavit. See *Aguilar v. Texas,* 378 U.S. 108. Here, there is no allegation whereby credibility could be assumed. Perhaps, the Court in its opinion below, goes on the basic presumption, as many state Courts are prone to do, that *U.S. v. Vantresca* (..... U.S. .....), relaxes *Aguilar*. We submit it does not.

The affiant further sets forth in the affidavit that he received information from one Lavina Medina, "known to your affiant to be on parole as a narcotics addict", to the effect that the narcotics which were in the possession of Frank Benjamin Ram were obtained by him from petitioner "at the aforesaid Sunland Service Station". There is no allegation that she personally observed the said Frank Benjamin Ram obtain the narcotics from petitioner. As such, the statement is not even within the personal knowledge of the informant. It constitutes hearsay upon hearsay.

Further, it should be noted there is no allegation in the affidavit that Lavina Medina is reliable in any sense of the word. To the contrary, the statement that she was on parole as a narcotics addict would support the conclusion that she was not reliable. As stated heretofore, there must be some basis for concluding that such declaration is credible or reliable set forth in the affidavit. See *Aguilar v. Texas,* supra. Here there is no such allegation.

Thus, the allegations regarding the observations of Ram and the information received by Lavina Medina is either unreliable hearsay or hearsay upon hearsay.

A further area exists for skepticism concerning the allegations contained in the affidavit. There is no allegation therein that Frank Benjamin Ram remained in the view of the investigating officers from the times that he was observed to "contact" petitioner (prior to the three alleged sales) up to and including the time of any supposed sales to the Federal agent.

Finally, the affidavit is far more defective in that it fails to state any ground whatever for believing on November 23, 1965, the date of the issuance of the warrant, any narcotics were in the possession of appellant at the Sunland Service Station which he operated. The affidavit relates only to sales alleged to have occurred "in the San Jose area" in the two weeks preceding the issuance of the warrant. Therefore, the affidavit failed as a matter of law to set forth probable cause for the issuance of the search warrant on November 23, 1965.

Accordingly, the District Court erred in denying petitioner's Motions to Suppress, in that evidence secured as a result of that search violated appellant's rights secured by the Fourth Amendment to the United States Constitution. The Court of Appeals compounded the error by affirming appellant's conviction.

At the hearing on the Motion to Suppress herein, the trial Court made the following observations:

At page 109 (R.T.), it stated:

> "Let's grab the case right by the throat. Suppose that this case were tried before a jury and the only evidence offered was the heroin which had been obtained in the course of buying activities by the Federal agents from Ram. That is the one physical evidence, but we have Ram and Lavina Medina as live witnesses. Both of these witnesses gave testimony to the effect that they were in a joint operation with defendant Rocha. The charge is conspiracy connected with the concealment and transportation of heroin. If the jury is willing to accept the testimony of these two witnesses, would it be held up?"

Later it stated at page 110 (R.T.):

> "If your answer to that is in the affirmative, it is obvious you have got probable cause on the same facts."

It states later, at page 110 (R.T.):

> "* * * Now, if those facts are sufficient to support a jury verdict, then inherently they must be strong enough to support probable cause, because if they were not it should never reach a jury."

The cited statements of the Court were erroneous. There is no question that if it is assumed as a primary premise that the evidence was legally obtained, the testimony of the informant under oath at trial provides sufficient probable cause to sustain a verdict of "guilty" by the jury.

There is no question that Federal law provides that the testimony of an accomplice provides sufficient probable cause to sustain a jury verdict of "guilty."

Perhaps it is an anomaly in the law, but the test for probable cause in an affidavit for a search warrant is stricter and more severe than that to sustain a verdict of conviction. No reliability need be shown in the testimony of an informant or co-conspirator in the trial itself, whereas the reliability of an informant or co-conspirator must be shown in an affidavit for search warrant. *Aguilar v. Texas,* supra.

It is submitted that because of this misunderstanding, the trial Court erred in denying petitioner's Motion to Suppress the evidence herein.

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3. THE SEARCH CANNOT BE JUSTIFIED ON THE ALTERNATIVE BASIS THAT THERE WAS PROBABLE CAUSE TO ARREST WITHOUT A WARRANT WHEN ALL THE ALLEGED FACTS ARE KNOWN TO THE OFFICERS AT THE TIME OF OBTAINING THE WARRANT BUT ARE NOT SET FORTH IN THE AFFIDAVIT.

To hold otherwise would result in an invitation to any law enforcement officer to *"expand"* his information nunc pro tunc in every case of a defective affidavit.

To hold otherwise would effectively destroy the case law developed by this Court in setting adequate standards of probable cause for the issuance of search warrants.

In its Opinion below, the Court of Appeals summarily denies the contention of petitioner that there had been an election herein (Opinion, pp. v-vi), citing only Court of Appeals cases to sustain its position.

Though many examples could be imagined where the "election" theory would not apply and a search could be made on alternative grounds, such is not the case here. All the factual allegations herein were known to the arresting officers at the time of obtaining the warrant.

What is the office of the warrant if arresting officers are allowed to elaborate on the factual allegations after a suspect is arrested pursuant to the color of the warrant?

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4. THE NARCOTIC DRUGS IMPORT AND EXPORT ACT, 35 STAT. 614 (1909) AS AMENDED, 21 U.S.C. SECTION 174 (1956) IS UNCONSTITUTIONAL IN PART AND IS THEREFORE IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

21 U.S.C. Section 174, provides in part:

> "Whoever * * * conceals * * * or in any manner facilitates the * * * concealment * * * of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * * shall be imprisoned * * *."

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains the possession to the satisfaction of the jury.*"

In effect, the statute allows a defendant to be convicted on a presumption which can only be rebutted by his affirmative evidence to the contrary.

A defendant in a criminal case need not take the stand and testify or explain; and if he does not take the stand and explain, he cannot be penalized therefor. *Fifth Amendment to the United States Constitution, Malloy v. Hogan,* 378 U.S. 1, *Griffin v. California,* 380 U.S. 609, *Miranda v. Arizona,* 384 U.S. 436.

The petitioner herein was charged under 21 U.S.C. 174 for concealing and facilitating the sale of heroin. At the trial, he took the stand and testified.[2] He denied knowledge of the presence of the contraband and gave no evidence to indicate the heroin was grown inside the state of California. Thus, he was convicted on a presumption which, in substance, has been negated by this Court in its decisions of the past few years.

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[2]Although petitioner tried to curtail the points on appeal to the errors in the Motion to Suppress, the Court of Appeals ordered petitioner to prepare a copy of the trial reporter's transcript of all trial testimony *at petitioner's expense* and against his vigorous protests. Thus, his testimony is properly before this court in the record filed herein.

It should be noted that finding the statute unconstitutional would not deter narcotic prosecutions by the several states. In most areas, federal narcotic law enforcement presently merely duplicates state law enforcement. All 50 states have stringent and adequate narcotic laws. The state of California is more oppressive in its sentencing than the federal government. See *California Health & Safety Code* Sections 11500 et seq.

A holding of unconstitutionality herein would stop duplication of law enforcement activities in the narcotic field and in no way effect the efficiency of law enforcement. Such would reduce the cost of narcotic enforcement to the federal government and retain jurisdiction in the federal government to cases which are truly interstate in nature and to cases involving smuggling.

The confusion, unequal treatment and jeopardy-like situations apparent in cases such as the case at bench would vanish if adequate standards are set by this Court and by a finding that the presumption in 21 U.S.C. Section 174 is unconstitutional as being in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated above, we respectfully submit that certiorari should issue to review the decision of the Court below.

Dated, San Francisco, California,
February 14, 1968.

WILLIAM KLEIN,
Attorney for Petitioner.

EDWARD L. CRAGEN,
Of Counsel.

(Appendices "A" and "B" Follow)